

SERVICE DATE – JUNE 14, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36096

THE STATE OF SOUTH DAKOTA ACTING BY AND THROUGH ITS DEPARTMENT OF  
TRANSPORTATION—PETITION FOR DECLARATORY ORDER

Digest:<sup>1</sup> The Board grants the State of South Dakota's request for an order declaring that the Napa-Platte Regional Railroad Authority's operating rights over a State-owned rail line are terminated.

Decided: June 12, 2017

On February 8, 2017, the State of South Dakota, acting by and through its Department of Transportation (the State), filed a petition seeking a declaratory order terminating the operating rights held by the Napa-Platte Regional Railroad Authority (NPRRA) pursuant to a modified certificate of public convenience and necessity over a State-owned rail line extending from milepost (MP) 13.4+/- near Tabor, S.D., to MP 54.5 near Ravinia, S.D. (Tabor-Ravinia Line). For the reasons discussed below, the Board will grant the State's petition.

BACKGROUND

The Tabor-Ravinia Line is the middle segment of a State-owned rail line located between MP 0.0, referred to as Napa Junction, in South Dakota, and MP 83.3 near Platte, S.D. (Napa-Platte Line). The State acquired the Napa-Platte Line after it was authorized for abandonment in 1980. Ogilvie—Aban.—in S.D., Iowa & Neb., AB 7 (Sub-No. 88) (ICC served May 14, 1980). The State subsequently leased the Napa-Platte Line to the NPRRA in 1981. See Napa-Platte Reg'l R.R. Auth.—Modified Rail Certificate, FD 35026 (STB served June 14, 2007) (describing history of the line). Between 1981 and 2007, the Napa-Platte Line was operated as needed by sublessees pursuant to modified certificates of public convenience and necessity. Id.; see 49 C.F.R. pt. 1150 subpart C.

In 2007, NPRRA obtained a modified certificate of public convenience and necessity to operate over the Tabor-Ravinia Line. Napa-Platte Reg'l R.R. Auth.—Modified Rail Certificate, FD 35026 (STB served June 14, 2007). NPRRA's most recent lease of the Tabor-Ravinia Line

---

<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

expired on September 20, 2015. The State says that it requested that NPRRA file a notice with the Board under 49 C.F.R. § 1150.24 to terminate its modified certificate rights, but NPRRA has refused to do so. (Pet. 3.) The State further says that NPRRA is a non-operating common carrier and that neither NPRRA nor any other carrier has provided any common carrier service over the Tabor-Ravinia Line since 2007. (Id.)

For several years, NPRRA, with the State's consent, subleased the Tabor-Ravinia Line to the Dakota Southern Railway Company (DSRC), an operating Class III carrier. (Id.) DSRC's most recent sublease with NPRRA expired on September 20, 2015. On September 21, 2015, the State leased the Tabor-Ravinia Line directly to DSRC. At the State's request, DSRC filed a notice with the Board on December 29, 2016, for a modified certificate of public convenience and necessity to provide common carrier service over the Tabor-Ravinia Line. The Board issued the modified certificate to DSRC on January 25, 2017. Dakota S. Ry.—Modified Certificate of Pub. Convenience & Necessity—Yankton, Bon Homme, & Charles Mix Ctys., S.D., FD 36086 (STB served Jan. 25, 2017).

## DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to eliminate controversy or remove uncertainty in a matter related to the Board's subject matter jurisdiction. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C. 2d 675 (1989).

The Board has special rules for operations over abandoned rail lines that have been acquired (through purchase or lease) by a state. 49 C.F.R. pt. 1150 subpart C. The acquisition of such a line approved for abandonment is exempted from the Board's jurisdiction; however, an operator that contracts with the state to provide service over the line incurs a common carrier obligation. These operators are exempted from the statutory requirements governing the start-up and termination of operations (49 U.S.C. §§ 10901 and 10903, respectively), but they must apply to the Board for a modified certificate of public convenience and necessity. Such operators may terminate service after providing 60-days' notice, which must be filed with the state, the Board, and all persons that have used the line within the six months preceding the date of the notice. 49 C.F.R. § 1150.24.

The State argues that NPRRA's refusal to file a notice terminating its modified certificate has created a controversy that can be resolved by a Board order declaring that NPRRA's modified certificate rights are terminated. The State argues that such an order terminating NPRRA's modified certificate rights would be consistent with a fundamental purpose of the Board's modified certificate rules—to allow quick termination of such certificates. Granting the order, the State argues, would both protect the State's right to control operations over a line that it owns and have no adverse effects on rail shippers. The State argues that the Board's procedures governing adverse discontinuance, which typically apply when a third party is seeking termination of operating authority previously obtained from the Board, do not and should not apply in a case involving termination of a modified certificate. The State argues that the Board should not allow

the “quick terminate-on-notice procedures” to turn into a “far more involved, far more expensive” adverse discontinuance proceeding. (Pet. 12.)<sup>2</sup>

Here we have a common carrier rail line authorized for abandonment under 49 U.S.C. § 10903 and later acquired by the State and operated under a modified certificate of public convenience and necessity. Cessation of operations under a modified certificate does not require a Board license; rather, an operator may terminate its service with a 60-day notice to the State, the Board, and shippers. 49 C.F.R. § 1150.24. Because the modified certificate program is intended to offer a simple, streamlined approach for continuing operations on rail lines slated for abandonment, the Board believes that states should be allowed to seek the removal of an operator who declines to file the 60-day termination notice with the Board. The Board finds that a declaratory order proceeding is an appropriate mechanism for seeking to remove a modified certificate operator when that operator does not affirmatively consent.

Under the circumstances of this case, the Board will grant the State’s request for a declaratory order. NPRRA’s lease with the State has expired and, although the Board’s regulations only provide a 60-day termination mechanism for the operator, they specifically state that the duration of service to be provided by the operator under a modified certificate “may be determined in the contract between the State and the operator.” 49 C.F.R. § 1150.24. NPRRA has not filed any opposition to the State’s request for a declaratory order to terminate its operating rights or otherwise attempted to explain why the expiration of the lease should not result in the termination of its operating rights. In addition, granting the proposed termination should not result in any adverse impact on shippers and the community, because a replacement carrier has already been granted the right to operate. NPRRA has not provided common carrier service over the Tabor-Ravinia Line since 2007, and DSRC has obtained a modified certificate of public convenience and necessity to provide common carrier service over the same line. (Pet. 3-4.) For these reasons, NPRRA’s operating rights over the Tabor-Ravinia Line under the modified certificate are terminated.

---

<sup>2</sup> The State cites two cases in which the Board permitted the state/line owner to file the 60-day termination notice on behalf of the operator. (Pet. 9) (citing S.D. Ry.—Notice of Interim Trail Use & Termination of Modified Rail Certificate, FD 31874, slip op. at 2 (STB served July 17, 2007); Chesapeake R.R.—Certificate of Interim Trail Use & Termination of Modified Certificate, FD 32609, slip op. at 1 n.2 (STB served Jan. 9, 2006).) However, in those cases, the Board permitted the state/line owner to do so because the operator was no longer a recognized corporate entity in the state where the rail line was located. The cases the State cites are thus not directly on point because here the operator still exists as an entity, but apparently has declined to file the termination notice on its own.

It is ordered:

1. The petition for declaratory order is granted; NPRRA's modified certificate of public convenience and necessity is terminated.
2. This decision is effective on the date of service.

By the Board, Board Members Begeman, Elliott, and Miller.